

NO. 46850-6-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

MICHAL R. LARISCH,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court's ruling allowing the state to elicit evidence of and to argue guilt from the defendant's non-verbal refusal to answer questions violated the defendant's state and federal constitutional rights to silence.

2. Trial counsel's failure to object when the state called a police officer to speculate that a physical reaction by the defendant constituted an admission of guilt violated the defendant's state and federal constitutional rights to effective assistance of counsel.

3. Substantial evidence does not support the defendant's conviction in count VI for first degree trafficking because the record contains no evidence that the vehicle engine at issue was stolen.

4. The trial court erred when it imposed an exceptional sentence on Count I based upon its miscalculation of the defendant's offender score at 12 points.

5. The trial court erred when it imposed legal financial obligations upon an indigent defendant without any discussion about the defendant's ability to pay.

Issues Pertaining to Assignment of Error

1. Does a trial court's ruling allowing the state to elicit evidence of and to argue guilt from a defendant's non-verbal refusal to answer questions violate that defendant's state and federal constitutional rights to silence?

2. Does a trial counsel's failure to object when the state calls upon a police officer to speculate that a physical reaction by a defendant constituted an admission of guilt violate that defendant's state and federal constitutional rights to effective assistance of counsel?

3. Does substantial evidence support a conviction for first degree trafficking in stolen property when the record contains no evidence that the property at issue was stolen?

4. Does a trial court err if it imposes an exceptional sentence based upon a miscalculation of the defendant's offender score at 12 points when the defendant's offender score was actually 9 or 10 points?

5. Does a trial court err if it imposes legal financial obligations upon an indigent defendant without any discussion about the defendant's ability to pay?

STATEMENT OF THE CASE

Factual History

In June of 2014, brothers Ralph McEntyre and Gary Gray opened a nursery on Highway 12 in Rochester, Washington. RP 45-48¹. Early on the morning of July 3, Mr. McEntyre arrived to open the business and found the gate open and the lock cut off. *Id.* Upon entering the property he found that someone had entered and stolen a vehicle trailer, a Kubota excavator, a second bucket for the excavator and some “tie downs.” *Id.* He also found a small amount of broken auto glass in the area where he had left the excavator and trailer, although the glass did not come from either item. RP 60. Mr. McEntyre had previously purchased the trailer for \$6,5000.00 and the business had paid \$35,000.00 for the excavator. RP 48, 51-52. Upon seeing that the trailer and excavator were missing, Mr. McEntyre called Thurston County Sheriff’s deputies to the scene to take a report. RP 162-163. Mr. McEntyre later posted a reward notice on local media promising to pay for information about the crime. RP 68.

On the same morning of July 3rd, the owner of an automobile repair shop a few miles from Mr. McEntyre and Mr. Gray’s nursery came to his

¹The record on appeal includes four continuously numbered volumes of verbatim reports of the jury trial held on 10/7/14, 10/8/14 and 1/9/14, as well as the sentencing hearing held on 10/29/14. There are referred to herein as “RP [page #].”

shop to find that someone had stolen a customer's white 1995 GMC 2500 truck that had been parked outside the business. RP 121-122. Very poor quality video surveillance footage showed that the previous night someone had walked up out of nearby weeds, broke the window, got in, started the vehicle and then drove away. RP 121-123. There was a small amount of broken auto glass where the truck had been. *Id.* The truck had a 6.5 liter diesel motor with a manual transmission. RP 130-131.

One month later on August 2nd, Mr. Gray received a tip originating from the reward posting. RP 70-72. As a result, he went out to 1410 South Scheuber Road in Centralia in Lewis County where he found the Kubota excavator on property owned by Terry Petrich. *Id.* Upon finding the excavator Mr. Gray called 911 and waited for a deputy to arrive. *Id.* Within a short time Deputy Jeffrey Humphrey of the Lewis County Sheriff's Office responded to the scene, spoke with Mr. Gray, and then walked over to the excavator with Mr. Gray, who verified that the excavator was the one that was stolen from the nursery. RP 86-87. Upon inspection he determined that the original ignition panel had been cut off and replaced with a new panel that used a different key. RP 72. A short while later Mr. Petrich returned to his property and explained to Mr. Gray and the deputy that a few weeks previous the defendant Michal Larisch and a friend had brought the excavator to the property on a trailer, off-loaded it and began to do clean up work on the

property as part of an agreement whereby Mr. Petrich gave the defendant a used Ford Bronco, a used BMW and a used white Dodge Pickup in return for his work. RP 186-188, 190.

As Deputy Humphrey and Mr. Gray were speaking with Mr. Petrich the defendant drove by in the white pickup Mr. Petrich had given him. RP 87, 190. When he did not stop Mr. Petrich pointed him out to the deputy. *Id.* The deputy then called to another officer to stop the defendant and arrest him. RP 90-91, 106-107. Within a few minutes Centralia Police Officer Chad Withrow found the defendant driving on Blanchard Road a few miles from Mr. Petrich's property, pulled him over and placed him under arrest. RP 106-107. At the time the officer pulled the defendant over the defendant was exceeding the speed limit. RP 106-107, 220. He also had an outstanding arrest warrant. *Id.* When the officer pulled the defendant's truck over he noted that there was an excavator bucket in the back. RP 90-91. Mr. Gray later verified that it was the second bucket stolen from the nursery. RP 73-74. Deputy Humphrey later spoke with the defendant, who initially denied having any involvement with the excavator. RP 90-91. He then stated that he had been doing some mechanical and electrical work on the excavator and some work on the bucket for Mr. Petrich. RP 92.

A few days after finding the missing excavator Mr. Gray went to a property off Roseburg Road in Rochester and found a trailer he believed to

be his property. RP 74-75. Later inspection of this trailer by the Washington State Patrol revealed that a visible serial number had been ground off the trailer, but a hidden serial number under the trailer matched the number for the trailer stolen from Mr. McEntyre and Mr. Gray's nursery. RP 178-180. A person named Gary Fisher owned the property where the trailer was found and told Mr. Gray and the officers called to the scene that he had previously purchased the trailer from the defendant for \$1,500.00, that the defendant had promised to give him the title, but he had never done so. RP 152-154.

A couple of days after the defendant's arrest, Deputy Humphrey had occasion to visit with a person by the name of Connie Todd, who owned the home where the defendant had been staying. RP 155. At her suggestion he then went to visit a person by the name of Brandon Perry. RP 93-94. At Mr. Perry's residence he found a diesel motor with a manual transmission attached to it. RP 94-95. Deputy Humphrey believed it might be the engine and transmission out of the truck stolen the same day from the automobile repair shop a few miles from the nursery. R 101-102. However, he did not attempt to have the truck owner identify the engine and transmission and although the motor recovered from Mr. Perry was a diesel the officers did not know its displacement. RP 135, 217.

Procedural History

By information filed August 6, 2014, and later amended a few weeks

before trial the Lewis County Prosecutor charged the defendant Michal R. Larisch with the following six crimes: I. Possession of a Stolen Vehicle (the Kubota Excavator); II. Second Degree Possession of Stolen Property (the trailer and the extra excavator bucket); III. Possession of a Stolen Vehicle (the truck stolen from the auto repair business); IV. First Degree Trafficking in Stolen Property (the Kubota Excavator); V. First Degree Trafficking in Stolen Property (the trailer); and (VI) First Degree Trafficking in Stolen Property (the vehicle engine from the truck stolen from the auto repair business). CP 1-3, 6-9. The case later came on for trial before a jury with the state calling 13 witnesses, including Mr. McEntyre and Mr. Gray (the owners of the nursery), the owner of the auto repair business and the owner of the truck stolen from that business, Terry Petrich, Gary Fisher, Centralia Police Officer Withrow and Deputy Humphrey (twice recalled). RP 44-218. They testified to the facts contained in the preceding factual history. *See Factual History, supra*. In addition, during his testimony Mr. Petrich denied that he had ever taken the Kubota loader to the property of a person by the name of Sean Sullivan and offered it for sale. RP 200-201. At no point in the trial did the state call Brandon Perry, apparently because they could not find him. RP 207.

Prior to *voir dire* in this case the state called Officer Withrow and Deputy Humphrey to testify at a CrR 3.5 hearing on the admissibility of the

defendant's post-arrest statements. RP 17. Officer Withrow testified that on August 2, 2013, he pulled the defendant over while he was driving on Blanchard Road in Centralia, placed him under arrest, read him his *Miranda* rights, and took him to the Lewis County Jail. RP 17-20. Deputy Humphrey testified that three days later he interviewed the defendant in jail about the stolen truck. RP 23-25. According to Deputy Humphrey he did not read the defendant his *Miranda* rights but he did ask him if he remembered Officer Withrow reading them to him three days previous. *Id.* The defendant stated that he did. *Id.* Deputy Humphrey then asked the defendant about the stolen engine and transmission. *Id.* According to Deputy Humphrey when he did the defendant dropped and shook his head and said that he "didn't want to talk about the case anymore." RP 23-25. Deputy Humphrey's testimony concerning this event was as follows:

Q All right. Did you confront Mr. Larisch with the fact that you have now spoken with Mr. Perry about him selling the car engine to him?

A I did.

Q Did Mr. Larisch make any gesture in response to you telling him that information?

A Yes, he did. He dropped his head and closed his eyes and began shaking his head.

Q All right. Well , actually, for purposes of this hearing did he make any statements after he made that gesture?

A Yes. He told me that he didn't want to talk about the case anymore after that.

Q Did you stop talking with him after that point?

A I did.

RP 23-25.

Following argument on the CrR 3.5 motion the court ruled that all of the defendant's statements and actions were admissible into evidence except his statement that he did not want to talk about the case anymore. RP 26-28. As a result, when Deputy Humphrey testified about this encounter he stated as follows:

Q Did you ask him any questions with regard to whether he had sold this car engine that you looked at to Brandon Perry?

A I did.

Q What was the question you asked him or what did you say to him about that?

A I asked him about selling the engine and transmission out of a GMC pickup to Brandon Perry.

Q And did Mr. Larisch make any gesture in response to that question?

A He did.

Q What was it?

A Mr. Larisch dropped his head, closed his eyes, began slightly shaking his head.

RP 96.

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Deputy Humphrey then told the jury that he interpreted the defendant's act of dropping his head, closing his eyes and slightly shaking his head as an admission of guilt. RP 104.

The court later entered the following written findings of fact, conclusions of law and order on the CrR 3.5 hearing.

FINDINGS OF FACT

1.1 On or about August 2, 2014, Cent. PD Off. Withrow traffic stopped Michal Larisch's car to assist the Lewis County Sheriff's Office with a stolen vehicle case. Off. Withrow immediately showed force and placed Larisch in custody.

1.2 Off. Withrow read stand *Miranda* rights to Larisch.

1.3 Of. Withrow spoke with Larisch regarding where he was driving. Larisch said that he had been going to Terry Petrich's house (which was nearby), but didn't stop there because the police were there.

1.4 LCSO Dep. Humphrey arrived and spoke to Larisch in custody regarding a stolen excavator. Larisch at first said he did not know anything about the excavator in question. When confronted with the fact that the spare bucket for the excavator was in the back of Larisch's truck, Larisch changed his story and said that he had done mechanical work on the excavator for Petrich, including wiring the ignition.

1.5 Dep. Humphrey investigated the case further and developed information that a GMC truck had been stolen at almost the same time as the excavator from a location near where the excavator was stolen. The stolen truck was believed to have been used to transport the stolen excavator. Larisch had sold a truck engine to one Brandon Perry, and the engine appeared to be from the stolen GMC truck.

1.6 Dep. Humphrey contacted Larisch again on or around August 5, 2014. Larisch was in custody on warrants and other

Centralia PD matters. Dep. Humphrey asked Larisch if he remembered his rights from having them read to him on August 2, 2014, and Larisch did.

1.7 Larisch told Humphrey the same story he had before regarding mechanical work on the excavator, and denied involvement with its theft. Dep. Humphrey then confronted Larisch with the fact that he had sold the engine of the stolen truck to Brandon Perry. Larisch made a gesture in which he sagged his body and looked down at the ground, which Dep. Humphrey understood as an indication that Larisch knew he had been caught.

1.8 Larisch further stated that he did not want to talk any further about the incident.

CONCLUSIONS OF LAW

2.1 Statement made in response to custodial interrogation by the police must be preceded by *Miranda* warnings to be admissible.

2.2 At all relevant times regarding the statements described in the findings of fact, Larisch was in custody.

2.3 Larisch was *Mirandized* before his statements to Off. Withrow, and so those statements are admissible.

2.4 Larisch was *Mirandized* before his statements to Dep. Humphrey on August 2, and so those statements are admissible.

2.5 Larisch was reminded of his *Miranda* warnings on August 5, 2014 and indicated understanding them before making any further statements, so the statements described in finding 1.7 are admissible. The Court is treating the gesture as a verbal statement.

2.6 The State formally announced and the Court agrees that the statement in finding 1.8 is inadmissible, to avoid commenting on Larisch's right to silence.

ORDER

3.1 The statements referred to in conclusions 2.3, 2.4, and 2.5

are admissible.

3.2 The statement referred to in conclusion 2.6 is inadmissible.
CP 103-106.

Following the close of the state's case the defense called Mr. Sean Sullivan to testify as the only witness for the defense. RP 239. He testified that indeed Mr. Petrich had brought the Kubota loader to his property and had tried to sell it to him for much less than it was actually worth. RP 239-241. After Mr. Sullivan's testimony the defense closed its case and the state offered no rebuttal. RP 250. The court then instructed the jury without objection or exception from the defense. RP 260-275. The state did take exception to the trial court's refusal to give its offered instruction on accomplice liability. RP 257-258.

Following the court instructions each party presented closing argument and the jury retired for deliberation. RP 276-310. The jury eventually returned the following verdicts in the case:

I. GUILTY: Possession of a Stolen Vehicle (the Kubota Excavator);

II. GUILTY: Second Degree Possession of Stolen Property (the trailer and the extra excavator bucket);

III. NOT GUILTY: Possession of a Stolen Vehicle (the truck stolen from the auto repair business);

IV. NOT GUILTY: First Degree Trafficking in Stolen Property (the Kubota Excavator);

V. GUILTY: First Degree Trafficking in Stolen Property (the trailer); and

VI. GUILTY: First Degree Trafficking in Stolen Property (the vehicle engine from the truck stolen from the auto repair business).

CP 66-72; RP 319-321.

The court later called this case for sentencing, during which the defendant acknowledged the following criminal history, all out of Thurston County:

1. Burglary 2 - sentenced 12/12/12
2. Trafficking in Stolen Property 1 - sentenced 12/12/12
3. TMVWOP 2 - sentenced 7/27/11
4. TMVWOP 2 - sentenced 7/27/11
5. VUCSA (possession) - sentenced 4/19/06

Given this criminal history and the fact that each prior for TMVWOP counted for three points on Count I, the trial court calculated the defendant's offender scores and standard ranges as follows:

Count No.	Offender Score	Seriousness Level	Standard Range	Maximum Term
I.	12	II	43-57 months	10 yrs + \$20,000
II.	8	I	17-22 months	5 years + \$10,000
V.	8	IV	53-70 months	10 yrs + \$20,000
VI.	8	IV	53-70 months	10 yrs + \$20,000

CP 101, 109.

In this case the defense did not argue and the trial court did not consider whether or not any of the current offenses constituted the "same

criminal conduct” for the purpose of calculating the defendant’s offender score. RP 324-336. Based upon this grid, the court sentenced the defendant to 43 months on Count I, 22 months on Count II, 53 months on Count V and 53 months on Count VI. CP 110. However, based upon the defendant’s offender score of 12 points on Count I, the court declared an exceptional sentence and ordered the sentence on Count I to run consecutively to the concurrent sentences on the remaining counts for a total sentence of 96 months. RP 329-330; CP 110, 117. Following imposition of sentence the defendant filed timely notice of appeal. CP 118.

ARGUMENT

I. THE TRIAL COURT'S RULING ALLOWING THE STATE TO ELICIT EVIDENCE OF AND TO ARGUE GUILT FROM THE DEFENDANT'S NON-VERBAL REFUSAL TO ANSWER QUESTIONS VIOLATED THE DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO SILENCE.

The Fifth Amendment to the United States Constitution states that no person "shall ... be compelled in any criminal case to be a witness against himself." Washington Constitution, Article 1, § 9 contains an equivalent protection. *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991). The courts liberally construe this right. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). At trial, this right prohibits the State from forcing the defendant to testify. *State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979). It further precludes the state from eliciting comments from witnesses or make closing arguments inviting the jury to infer guilt from the defendant's silence. *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979). Finally, as part of the Fifth Amendment right to silence, a defendant has the right to consult with an attorney prior to and during questioning. *State v. Earls, supra*. Any comment on the invocation to this Fifth Amendment right to counsel also improperly impinges upon the Fifth Amendment right to silence. *Id.*

For example, in *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996), the state charged the defendant with multiple counts of vehicular

homicide. At trial the chief investigating officer testified that he found the defendant in a gas station bathroom shortly after the accident and the defendant “totally ignored” him when he asked what happened. The police officer also testified that upon further questioning the defendant looked down, “once again ignoring me, ignoring my questions.” Following conviction the defendant appealed, arguing that this testimony violated his Fifth Amendment right to silence.

In addressing this issue the Washington Supreme Court first reviewed the rights protected under both Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, stating as follows:

The right against self-incrimination is liberally construed. It is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt. To enforce this principle, upon arrest, an accused must be advised he or she can remain silent.

At trial, the right against self incrimination prohibits the State from forcing the defendant to testify. Moreover, the State may not elicit comments from witnesses or make closing arguments relating to a defendant’s silence to infer guilt from such silence. As the United States Supreme Court said in *Miranda*, “[t]he prosecution may not ... use at trial the fact [the defendant] stood mute or claimed his privilege in the face of accusation.” The purpose of this rule is plain. An accused’s Fifth Amendment right to silence can be circumvented by the State “just as effectively by questioning the arresting officer or commenting in closing argument as by questioning defendant himself.”

State v. Easter, 130 Wn.2d at 235-236 (citations omitted).

In *Easter*, the prosecution tried to take the statements admitted at trial

out of Fifth Amendment analysis by arguing that they were “pre-arrest,” and thus not constitutionally protected. The court noted: “[t]he State argues pre-arrest silence may be used to support the State’s case in chief because the Fifth Amendment is designed to deal only with ‘compelled’ testimony, and Easter was under no compulsion to speak at the accident scene prior to his arrest.” *Easter*, 130 Wn.2d at 237-38. The Court rejected this argument, holding as follows:

We decline to read the Fifth Amendment so narrowly as the State urges. An accused’s right to silence derives, not from *Miranda*, but from the Fifth Amendment itself. The Fifth Amendment applies before the defendant is in custody or is the subject of suspicion or investigation. The right can be asserted in any investigatory or adjudicatory proceeding. Indeed, the *Miranda* warning states the accused is entitled by the Fifth Amendment to remain silent; *Miranda* indicates the right to silence exists prior to the time the government must advise the person of such right when taking the person into custody for interrogation. When the State may later comment an accused did not speak up prior to an arrest, the accused effectively has lost the right to silence. A “bell once rung cannot be unrung.” The State’s theory would encourage delay in reading *Miranda* warnings so officers could preserve the opportunity to use the defendant’s pre-arrest silence as evidence of guilt.

The State’s belief that the Fifth Amendment applies only to “compelled testimony” also implies that an accused acquires the right to silence only when advised of such right at the time of arrest. This is not so. No special set of words is necessary to invoke the right. In fact, an accused’s silence in the face of police questioning is quite expressive as to the person’s intent to invoke the right regardless of whether it is pre-arrest or post-arrest. If silence after arrest is “insolubly ambiguous” according to the *Doyle* Court, it is equally so before an arrest.

State v. Easter, 130 Wn.2d 238-239 (citations omitted).

Given this analysis, the Supreme Court reversed, finding an error of constitutional magnitude, and insufficient proof by the state that the error was harmless beyond a reasonable doubt.

The decision in *Easter* is on point with the facts in the case at bar. In the case at bar the defendant both verbally and non-verbally exercised his right to silence in the face of police questioning when he shook his head while at the same time stating that he had decided to exercise his right to silence. Deputy Humphrey described this event as follows during his testimony at the CrR 3.5 hearing:

Q All right. Did you confront Mr. Larisch with the fact that you have now spoken with Mr. Perry about him selling the car engine to him?

A I did.

Q Did Mr. Larisch make any gesture in response to you telling him that information?

A Yes, he did. He dropped his head and closed his eyes and began shaking his head.

Q All right. Well , actually, for purposes of this hearing did he make any statements after he made that gesture?

A Yes. He told me that he didn't want to talk about the case anymore after that.

Q Did you stop talking with him after that point?

A I did.

RP 23-25.

In spite of the fact that the defendant both non-verbally (shaking his head “no”) while at the same time verbally stating that he was exercising his right to silence, the court allowed the prosecution to both offer the non-verbal refusal to answer the question into evidence and to then argue that the jury should infer guilty from this non-verbal refusal to answer the question. During trial this evidence came in as follows:

Q Did you ask him any questions with regard to whether he had sold this car engine that you looked at to Brandon Perry?

A I did.

Q What was the question you asked him or what did you say to him about that?

A I asked him about selling the engine and transmission out of a GMC pickup to Brandon Perry.

Q And did Mr. Larisch make any gesture in response to that question?

A He did.

Q What was it?

A Mr. Larisch dropped his head, closed his eyes, began slightly shaking his head.

RP 96

Although this line of questioning clearly reveals the state’s desire to argue guilt from the defendant’s refusal to answer a question and from the defendant’s exercise of his right to silence, the state went on in redirect

examination to invite Deputy Humphrey to tell the jury that the defendant's refusal to answer any more questions was an admission of guilty. This testimony on redirect was as follows:

Q Mr. Underwood asked you about the meaning of the gesture that Mr. Larisch made when you told him about Brandon Perry buying this engine from him. What meaning did you take from the gesture that Mr. Larisch made?

A That he had been caught.

RP 104.

As the following portion of the state's closing argument reveals, the state specifically argued that the jury should infer guilty from the defendant's decision to shake his head and not answer the question propounded.

In a nutshell , that's all you've got. That's the story. Well, there's one other little thing you have. You have the fact that Deputy Humphrey diligently goes back to interview Mr. Larisch again after he's got all the information and he talks to him about it and again Mr. Larisch discusses how he didn't have much to do with the excavator. And so Deputy Humphrey says, "Well , hey, what about the engine you sold to Brandon Perry?" And you get the, (indicating) .

RP 282-283.

This type of evidence and argument is precisely what the trial court allowed in *Easter* and what the Washington Supreme Court condemned as a violation of the right to silence guaranteed in both United States Constitution, Fifth Amendment, and Washington Constitution, Article 1, § 9. Thus, in the same manner that the trial court erred in *Easter* when it allowed the state to

elicit evidence of and to argue guilt from the defendant's non-verbal exercise of his right to silence so the trial court erred in the case at bar when it allowed the state to elicit evidence of and to argue guilt from the defendant's non-verbal exercise of his right to silence.

As an error of constitutional magnitude, the state's violation of the defendant's right to silence under both United States Constitution, Fifth Amendment, and Washington Constitution, Article 1, § 9, is presumed to be prejudicial and the State bears the burden of proving that the error was harmless beyond a reasonable doubt. *State v. Franklin*, 180 Wn. 2d 371, 382, 325 P.3d 159 (2014). The state only meets this burden if an appellate court is "convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." *State v. Watt*, 160 Wash.2d 626, 635, 160 P.3d 640 (2007). In other words, a constitutional error is only harmless if the appellate court "cannot reasonably doubt that the jury would have arrived at the same verdict in its absence." *State v. Franklin*, 180 Wn.2d at 383 (citing *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010)).

In the case at bar the error was far from harmless. Of all of the crimes charged, the evidence on the claim that the defendant trafficked in a stolen engine was the weakest. This weakness is illustrated by the following: (1) the state did not have any serial numbers from the recovered engine, (2) the

police did not have the alleged owner of the engine identify it, and (3) the police did not determine the displacement on the recovered engine. Thus, while both the engine out of the stolen truck and the recovered engine were diesels, this was all the evidence of identity. This evidence is far from overwhelming and does not meet the state's heavy burden of overcoming the constitutional error in this case. As a result, this court should reverse the defendants conviction in Count VI for trafficking in stolen property and remand for a new trial.

II. TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE CALLED A POLICE OFFICER TO SPECULATE THAT A PHYSICAL REACTION BY THE DEFENDANT CONSTITUTED AN ADMISSION OF GUILT VIOLATED THE DEFENDANT'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel's failure to object when the state called upon a deputy to give his opinion that the defendant's action in shaking his head and refusing to answer a question propounded by the deputy constituted an admission of guilt. The following sets out this argument.

Under Washington Constitution, Article 1, § 3, and under United States Constitution, Sixth Amendment every criminal defendant has the right

to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). As a result no witness whether a lay person or expert may give an opinion as to the defendant's guilt either directly or inferentially "because the determination of the defendant's guilt or innocence is solely a question for the trier of fact." *State v. Carlin*, 40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

"[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... 'merely tells the jury what result to reach.'" (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. "Personal opinions on the guilt ... of a party are obvious examples" of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant's guilt is an improper lay or expert opinion because the determination of the defendant's guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).

The expression of an opinion as to a criminal defendant's guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. See *Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

State v. Carlin, 40 Wn.App. 701; See also *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state's expert to testify in a rape case that the alleged victim suffered from "rape trauma syndrome" or "post-traumatic stress disorder" because it inferentially constituted a statement of opinion as to the

defendant's guilt or innocence).

For example, in *State v. Carlin, supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial the dog handler testified that his dog found the defendant after following a "fresh guilt scent." On appeal the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed noting that "[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial." *State v. Carlin*, 40 Wn.App. at 703.

In this case at bar the state specifically called upon Deputy Humphrey to render his opinion on the defendant's guilt based upon the defendant's refusal to answer a question the officer had given him. As was mentioned in the previous argument, this occurred during the state's redirect examination of Deputy Humphrey. This question and answer went as follows:

Q Mr. Underwood asked you about the meaning of the gesture that Mr. Larisch made when you told him about Brandon Perry buying this engine from him. What meaning did you take from the gesture that Mr. Larisch made?

A That he had been caught.

RP 104.

Although the deputy did not say “I think the defendant is guilty,” the statement just quoted was the functional equivalent to it. There was no conceivable tactical reason for the defendant’s attorney to refrain from objecting to this question and answer, given its purpose and effect of telling the jury that in the officer’s opinion the defendant was guilty. Thus, trial court’s failure to object fell below the standard of a reasonably prudent attorney. In addition, given the paucity of evidence proving that the engine at issue at trial was the engine out of the stolen truck, there is a reasonable probability that, but for counsel’s errors, the result in the proceeding would have been different. Thus, trial counsel’s failure to object denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result, this court should reverse the conviction on Count VI and remand for a new trial.

III. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE DEFENDANT’S CONVICTION IN COUNT VI FOR FIRST DEGREE TRAFFICKING BECAUSE THE RECORD CONTAINS NO EVIDENCE THAT THE VEHICLE ENGINE AT ISSUE WAS STOLEN.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime

charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether “after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential

elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the state charged the defendant in Count VI with first degree trafficking in stolen property under RCW 9A.82.050(1) pursuant to an allegation that he had stolen a truck, taken the engine out of it and then sold that engine to another person. *See* Count VI, Amended Information at CP 8. The cited statute states:

(1) A person who knowingly initiates, organizes, plans, finances, directs, manages, or supervises the theft of property for sale to others, or who knowingly traffics in stolen property, is guilty of trafficking in stolen property in the first degree.

RCW 9A.82.050(1).

Under this statute there are two alternative methods of committing the offenses: (1) by knowingly initiating, organizing, planning, financing, directing, managing or supervising “the theft of property for sale to others”, or (2) by “knowingly” trafficking in “stolen property.” Under RCW 9A.82.010(19), the term “traffic” as is used in this statute means

to sell, transfer, distribute, dispense, or otherwise dispose of stolen property to another person, or to buy, receive, possess, or obtain control of stolen property, with intent to sell, transfer, distribute, dispense, or otherwise dispose of the property to another person.

RCW 9A.82.010(19).

Thus, under the second alternative in RCW 9A.82.050(1), a person commits the crime of first degree criminal trafficking by “knowingly” selling,

transferring, distributing, dispensing or disposing of stolen property to another, or by knowingly obtaining control of stolen property with the intent to sell, transfer, distribute, dispense or otherwise dispose of it to another person.

Under both alternative methods of committing this offense, and under the definition of the word “traffic” as it is provided in the statute, the state has the burden of proving beyond a reasonable doubt that the property at issue was stolen. In other words, if the property at issue is not stolen, then it is impossible to commit this offense. This is precisely the missing element in Count VI in the case at bar: no evidence that the motor the defendant sold was stolen. There was no comparison of VIN numbers from the motor from the stolen truck and the recovered motor, although both were diesels the state did not even present evidence that both motors had the same displacement, and the state did not have the truck owner attempt to identify the recovered motor. This evidence simply added up to a “suspicion” that the motor the deputies recovered was the motor from the stolen truck. As the court clarified in *State v. Taplin*, 9 Wn.App. at 557, “[m]ere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence.” (citing *State v. Moore, supra*). As a result, the trial court erred in this case when it entered a judgement against the defendant on Count VI.

IV. THE TRIAL COURT ERRED WHEN IT IMPOSED AN EXCEPTIONAL SENTENCE ON COUNT 1 BASED UPON ITS MISCALCULATION OF THE DEFENDANT'S OFFENDER SCORE AT 12 POINTS.

Under RCW 9.94A.589(1)(a), at sentencing on two or more offenses, if “some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime.” *State v. Vike*, 125 Wn.2d 407, 885 P.2d 824 (1994). Under this statute, the term “same criminal intent” means “two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.” *State v. Garza-Villarreal*, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993). The term “same criminal intent” as used in this definition does not mean the same “specific intent” for each particular offense. *State v. Porter*, 133 Wn.2d 177, 181, 942 P.2d 974 (1997). Rather, it means the same “objective intent.” *Id.*

For example, in *State v. Deharo*, 136 Wn.2d 856, 966 P.2d 1269 (1998), the trial court convicted the defendant of Delivery of Heroin, and Conspiracy to Deliver Heroin. At sentencing, the trial court found that these two offenses had the same victim and were committed at the same time and place. However, the court ruled that these two offenses did not constitute the “same criminal conduct” for the purpose of sentencing because they had different intent elements. The defendant appealed this ruling.

The Court of Appeals reversed the trial court on the sentencing issue,

holding as follows:

[T]he present case, the “objective intent” underlying the two charges is the same - to deliver the heroin in one or both conspirators’ possession. Possessing that heroin was the “substantial step” used to prove the conspiracy. Since both crimes therefore involved the same heroin, it makes no sense to say one crime involved intent to deliver that heroin now and the other involved intent to deliver it in the future. Nor is there any factual basis for distinguishing the two crimes based on objective intent to deliver some now and some later. Under the reasoning in *Porter*, the two crimes should be treated as encompassing the same criminal conduct.

State v. Deharo, 136 Wn.2d at 858.

Similarly, in *State v. Saunders*, 120 Wn.App. 80, 86 P.3d 232 (2004), a defendant convicted of murder, robbery, kidnaping, and rape out of the same incident argued that his trial counsel had been ineffective when he failed to argue that the rape and the kidnaping constituted the “same criminal conduct” for the purpose of determining his offender score. The court agreed, holding as follows:

Under the facts here, it appears that Williams’s primary motivation for raping Grissett by inserting a television antenna in her anus was to dominate her and to cause her pain and humiliation. Because this intent arguably was similar to the motivation for the kidnap, defense counsel was deficient for failing to make this argument. Further, as the case law provides strong support to this argument, the failure was prejudicial. *See State v. Tili*, 139 Wn.2d 107, 122, 985 P.2d 365 (1999); *Edwards*, 45 Wn.App. at 382, 725 P.2d 442; *State v. Taylor*, 90 Wn.App. 312, 321, 950 P.2d 526 (1998).

Thus, counsel’s decision not to argue same criminal conduct as to the rape and kidnaping charges constituted ineffective assistance of counsel and requires a remand for a new sentencing hearing where

defense counsel can make this argument.

State v. Saunders, 120 Wn.App. at 825.

In the case at bar, the state's theory of the case as it was outlined in closing argument was that the defendant stole the truck mentioned in Counts III and VI, drove it over to the Nursery, attached it to a trailer mentioned in Count II and V, drove the excavator mentioned in Counts I and IV up on to the trailer and drove off with the trailer, excavator, extra bucket and other small items and that the defendant took these actions with the intent to sell this stolen property. Indeed, the state further claimed that the defendant attempted to sell the Excavator, and did sell the trailer and motor out of the truck.

As the state's theory of the case, the amended information and the evidence presented at trial reveal, the defendant acted with one objective intent: to steal property with the intent to sell it to get money or other goods. In addition, under the trafficking statute as discussed in the previous argument, the crime of trafficking is complete when a person steals or takes possession of property with the intent of selling or transferring it to another person. Thus, in this case all counts for which the defendant was convicted (I, II, V, and VI) were all committed at the same time and place. Thus, since Mr. McEntyre and Mr. Gray were the owners of the property that was the subject of Counts I, II and V, these three offenses constituted the same

criminal conduct. However, since the victim in Count VI was the owner of the truck, it stands as a separate offense.

In this case the trial court calculated the defendant's offender score on Count I as 12 points. The court arrived at this score by using a three point multiplier on two of the defendant's five prior offenses, adding one point each for the other three prior offenses, and then adding one point each for the concurrent convictions in Counts II, V and VI. CP 101, 109. As the foregoing explains, the trial court erred when doing so because Count II and V were both the same criminal conduct with Count I. Thus, if Count VI is used to add one concurrent point, the defendant's offender score on Count I was 10 points, not 12 points. However, if this court accepts the defendant's other argument that substantial evidence does not support the conviction in Count VI, then the defendant's offender score on Count I would be 9 points, not 12 points.

In this case the trial court imposed an exceptional sentence on Count I based solely upon its belief that the defendant's offender score was well above the maximum 9 points. Since the court was factually incorrect in its calculation of defendant's offender score, the trial court erred when it imposed the exceptional sentence. As a result, this court should vacate the defendant's sentence on Count I and remand with instructions to impose a sentence on that count within the standard range.

V. THE TRIAL COURT ERRED WHEN IT IMPOSED LEGAL FINANCIAL OBLIGATIONS UPON AN INDIGENT DEFENDANT WITHOUT ANY DISCUSSION ABOUT THE DEFENDANT'S ABILITY TO PAY.

A trial court's authority to impose legal financial obligations as part of a judgment and sentence in the State of Washington is limited by RCW 10.01.160. Section three of this statute states as follows:

(3) The court shall not sentence a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

RCW 10.01.160(3).

Although the court need not enter written findings and conclusions in regards to a defendant's current or future ability to pay costs, the court must consider this issue and find either a current or future ability before it has authority to impose costs. *State v. Eisenman*, 62 Wn.App. 640, 810 P.2d 55, 817 P.2d 867 (1991). In addition, in order to pass constitutional muster, the imposition of legal financial obligations and any punishment for willful failure to pay must meet the following requirements:

1. Repayment must not be mandatory;
2. Repayment may be imposed only on convicted defendants;
3. Repayments may only be ordered if the defendant is or will be able to pay;
4. The financial resources of the defendant must be taken into

account;

5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;

6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion; and

7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992).

The imposition of costs under a scheme that does not meet with these requirements, or the imposition of a penalty for a failure to pay absent proof that the defendant had the ability to pay, violates the defendant's right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment. *Fuller v. Oregon*, 417 U.S. 40, 40 L.Ed.2d 642, 94 S.Ct. 2116 (1974).

In the case at bar the trial court summarily imposed legal financial obligations without any consideration of the defendant's ability to pay those obligations. Thus, the trial court violated RCW 10.01.160(3), as well as the defendant's right to equal protection under Washington Constitution, Article 1, § 12, and United States Constitution, Fourteenth Amendment. As a result, this court should reverse the imposition of legal-financial obligations and remand for consideration of the defendant's ability to pay.

In this case the state may argue that this court should not address this issue because the defendant did not preserve the statutory error at the trial level and the argument does not constitute a manifest error of constitutional magnitude as is defined under RAP 2.5(a). However, in *State v. Blazina*, No. 89028-5 (filed 8/12/15), the Washington Supreme Court took the opportunity to review the pervasive nature of trial courts' failures to consider each defendant's ability to pay in conjunction with the unfair penalties that indigent defendant's experience based upon this failure. The court then decided to deviate from this general rule precluding review. The court held:

At sentencing, judges ordered *Blazina* and *Paige-Colter* to pay LFOs under RCW 10. 01.160(3). The records, however, do not show that the trial judges considered either defendant's ability to pay before imposing the LFOs. The defendants did not object at sentencing. Instead, they raised the issue for the first time on appeal. Although appellate courts will normally decline to hear unpreserved claims of error, we take this occasion to emphasize the trial court's obligation to consider the defendant's ability to pay.

We hold that RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay. Because the records in this case do not show that the sentencing judges made this inquiry into either defendant's ability to pay, we remand the cases to the trial courts for new sentence hearings.

State v. Blazina, at 11-12.

In this case the record reveals that the trial court imposed a 96 month

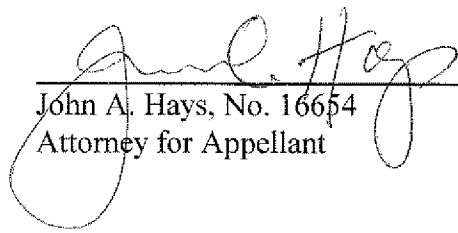
sentence on a 50-year-old indigent defendant who will be well in his late fifties prior to release without any consideration of his ability to pay. Appellant argues that this case would also be appropriate for this court to exercise its discretion to review the issue of legal-financial obligations.

CONCLUSION

The trial court's decision to allow the state to present evidence of and to argue guilt from the defendant's invocation of his right to silence, and counsel's failure to object to the admission of opinion evidence of guilt requires reversal of the defendant's convictions and a remand for retrial. In addition, since substantial evidence does not support the conviction in Count VI, this court should reverse that conviction with instructions to dismiss. In the alternative, this court should vacate the exceptional sentence in this case and remand for sentencing within the standard range.

DATED this 10th day of April, 2015.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 3

No person shall be deprived of life, liberty, or property, without due process of law.

WASHINGTON CONSTITUTION ARTICLE 1, § 9

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

WASHINGTON CONSTITUTION ARTICLE 1, § 22

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

COURT OF APPEALS OF WASHINGTON, DIVISION II

**STATE OF WASHINGTON,
Respondent,**

NO. 46850-6-II

vs.

**AFFIRMATION
OF SERVICE**

**MICHAL R. LARISCH,
Appellant.**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Jonathan Meyer
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2. Michal R. Larisch, No.300793
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Dated this 10th day of April, 2015, at Longview, WA.



Donna Baker

HAYS LAW OFFICE

April 10, 2015 - 10:01 AM

Transmittal Letter

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